

an offence punishable under Section 411 of the Penal Code and (3) of being in possession of property reasonably suspected of being stolen or fraudulently obtained, an offence punishable under Section 35 of the Minor Offences Enactment, were preferred against the appellant. The proceedings under the Criminal Procedure Code were tried first and after hearing the whole case the Magistrate at Selama postponed sentence pending the trial of the charges for the substantive offences. The Magistrate convicted the appellant on all the charges. On appeal to the Supreme Court:—

Held, that the trial of the proceedings under Section 68 (b) of the Criminal Procedure Code when there were charges pending for substantive offences was irregular and that there should be a new trial before a different Magistrate.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Brodie, Deputy Public Prosecutor, for the Respondent.

Cur. Ad. Vult.

MURRAY-AYNSLEY, J.—In this case proceedings were taken against the Appellant under Section 68 (b) Criminal Procedure Code and also for substantive offences under Section 411 of the Penal Code and Section 35 of Cap. 46. The proceedings under the Criminal Procedure Code were taken first. I think that this was wrong as the evidence under those proceedings would be of a kind that is carefully excluded from ordinary criminal proceedings. In view of that I cannot regard the proceedings in the subsequent trial as satisfactory though there was evidence on which the Magistrate could convict. I think the only thing to be done is to order a new trial before a different Magistrate.

I would add that I cannot see the purpose of proceedings under 68 (b) of the Criminal Procedure Code when there is a charge pending for a substantive offence.

New trial ordered.

[REVISIONAL CIVIL JURISDICTION]

AITKEN, J.

March 3, 1939

MANIKAM MANDOR....Defendant Applicant
vs.

S. MUNIANDY THEVAR..Plaintiff-Respondent
[N. S. MISCELLANEOUS CIVIL APPLICATION No. 11
of 1938]

Civil Procedure Code, S. 237—Courts Enactment (Cap. 2)—Appeal to Court of a Judge from hearing before Magistrate by way of appeal from Court of a Penghulu—Practice—Costs—Power of Court to award or disallow.

The Respondent commenced a suit against the applicant in the Court of the Penghulu for the recovery of \$5/- as money lent to the applicant. The Penghulu gave judgment in favour of respondent for the amount claimed and costs. The applicant appealed against this judgment

to the Magistrate at Jelubu. The learned magistrate decided to try the case *de novo* and directed the respondent to file a plaint. The respondent filed a plaint claiming \$5/- as money deposited with the applicant. A defence was filed denying any such deposit, and pleading the Limitation Enactment. The Magistrate heard the suit by way of appeal from the Penghulu. After hearing, the Magistrate dismissed the claim but ordered that each party should bear his own costs both of the trial in his Court and of the trial before the Penghulu. The Magistrate made no record of his reasons for directing that the costs should not follow the event. Upon the application for review of the Magistrate's decision:—

Held, that the Magistrate should have stated in writing under section 237 (i) of the Civil Procedure Code his reasons for directing that the costs should not follow the event and that the respondent having successfully resisted the claim and not having misconducted himself, was entitled as of right to his costs.

PETITION FOR REVISION.

Rintoul for the Applicant.

C. M. P. Pillay for the Respondent.

Cur. Adv. Vult.

AITKEN, J.—This is a petition presented by the defendant-Applicant asking me to revise a decision of the learned Magistrate at Jelubu whereby he deprived the successful party in an appeal against a judgment of the Penghulu at Kuala Klawang of his costs.

The facts giving rise to this petition are shortly as follows: on the 4th of May 1938, the present Respondent commenced a suit against the present Applicant in the Court of the Penghulu at Kuala Klawang, claiming \$5/- as money lent to the applicant and never repaid. On the 16th of August, 1938, the Penghulu heard that suit and gave judgment in favour of the Respondent for the amount claimed and costs.

The Applicant appealed against this judgment to the Magistrate at Jelubu, and counsel appeared before him on the appeal for both parties. After hearing some legal arguments on the record made by the Penghulu, the learned Magistrate decided to hear the whole case "*de novo*" and directed the Respondent to file a plaint.

In accordance with this direction the Respondent filed a plaint in the Magistrate's Court on the 11th of October, 1938, claiming \$5/- from the applicant as money deposited with him in May 1935 for safe keeping. It will thus be observed that the Respondent shifted the basis of his claim, so to speak, from the loan to deposit; and the reasons for this shift appear to be connected with the provisions of the Limitation Enactment. Four days later a defence was filed denying any such deposit, and pleading the Limitation Enactment in the alternative.

The learned Magistrate heard this suit for \$5/-, by way of appeal from the Penghulu, on the 10th of November, 1938 with the assistance of Counsel for both parties. At the end of the hearing the learned Magistrate dismissed the Respondent's claim, but directed that the parties

should bear their own costs both of the trial in his Court and of the trial before the Penghulu.

I have three observations to make about this trial before the learned Magistrate. In the first place the Respondent, who had stated in his evidence in the Penghulu's Court that the \$5/- in question was a loan to the Applicant, suited his evidence on appeal to the revised basis of his claim and denied that he had lent any money to the Applicant. In the second place when the Applicant gave evidence that he never borrowed any money from the Respondent, or received any money from him for safe keeping, he was not cross-examined by Mr. Pillai who was appearing for the Respondent. In the third place the learned Magistrate made no note on the record of his reasons for directing that the costs should not follow the event, though it would seem that he ought to have done so pursuant to section 237 (ii) of the Civil Procedure Code. This sub-section provides that "Where the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing". I think that the words "shall state its reasons in writing" must refer to the date on which the decision itself is given, and that "grounds of judgment", which are only drawn up for the purposes of an appeal, cannot properly be regarded as a compliance with the provisions of this sub-section.

It may well be conceded that section 237 (i) of the Civil Procedure Code gives the Courts to which it applies a wide discretionary power to deal with the costs of all proceedings before them, and this view is borne out by the provisions of rule 1 of the 1932 Rules relating to costs in Magistrate's Courts. But wide though a Magistrate's discretion may be in regard to costs, it is nevertheless a judicial discretion and must be exercised on fixed principles. It must be exercised according to rules of reason and justice, not according to private opinion, or benevolence or sympathy. Thus it is well established that where a party successfully enforces a legal right, and in no way misconducts himself, then he is entitled as of right to his costs: See *Cooper v. Whittingham* (1880) 15 Chancery Division 501, and *Jones v. Curling* (1884) 13 Queen's Bench Division 265. On the same principle it seems to me that when a Defendant successfully resists a Plaintiff's claim, and has in no way misconducted himself, then he, too, is entitled as of right to his costs.

Applying this principle, which I have just enunciated, to the facts and proceedings in this case, I entertain no doubt whatever that the costs should have followed the event. There is not a shred of evidence that the Applicant misconducted himself in any way or at any time before or during the proceedings, and he has been put to no inconsiderable trouble and expense in his perfectly legitimate endeavours to get a wrong

judgment against himself set aside. In my opinion there was no material on which the learned Magistrate could have exercised a discretion in favour of the Respondent, and a perusal of his "grounds and supplementary grounds of judgment" certainly discloses none. So far as I can understand these grounds and supplementary grounds, he thought that he ought to treat the event as "a drawn match" (to quote his own words) because he was not at all clear as to what the true facts of the case might be. I am afraid that all judicial officers are frequently in some doubt as to what the true facts of a case may be, but that alone does not justify them in depriving a successful party of his costs.

For these reasons I am clearly of opinion that the learned Magistrate's order as to costs was wrong in law, and is therefore open to review by me under section 54 (ii) and (iii) of the Courts Enactment though the amount in dispute is only \$5/-. Indeed, Mr. Pillai, who appeared before me for the Respondent did not contend that it was right; but confined his argument to the suggestion that no appeal lies from a Magistrate's decision when he is sitting in appeal on a judgment of a Penghulu's Court. To that proposition I am not prepared to accede. The words used in section 54 (ii) and (iii) of the Courts Enactment are sufficiently wide to include such decisions and I can see no reason why they should be read otherwise than in their normal and popular sense.

In the result the Magistrate's order as to costs must be set aside, and the Applicant must have his costs of the proceedings in this case both in the Court of the Penghulu and in the Court of the learned Magistrate. I also award him the costs of his petition to me and of the hearing and judgment consequent thereon. The Court below to carry out these orders.

Appeal allowed with costs.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.A.

March 25, 1939.

CHOW TUCK HENG.....Plaintiff
vs.
SOONG SOOI.....Defendant.

[BENTONG CIVIL SUIT No. 2 of 1937]

Limitation Enactment (Cap. 18) s.19—payment of interest by agent—lien-holder not a chargee—receipt of produce may operate as payment of interest.

Notwithstanding that a lien-holder is not a chargee within section 19 (ii) of the Limitation Enactment (Cap. 18) the receipt of produce from a duly authorised agent of the debtor may operate as an effective payment of interest.

W. G. W. Hastings for the Plaintiff.

S. M. Sharma for the Defendant.